1952

State of Utah v. Delbert Waters : Brief of Defendant and Appellant

Utah Supreme Court

Tex R. Olsen; Attorney for Defendant and Appellant;

7812

IN THE SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent

vs

DELBERT WATERS,

Defendant and Appellant

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BRIEF OF DEFENDANT AND APPELLANT

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CASES CITED

STATUTES

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STATEMENT OF THE CASE

The parties are designated as they were in the trial court. The defendant, Delbert Waters, was charged by information filed in the District Court for Sevier County State of Utah, with the crime of assault with intent to rape, as follows:

"Delbert Waters, having heretofore to-wit, on the 29th day of August, 1951, by G.W. Coons Esq., Justice of the Peace of Richfield Precinct Sevier County, State of Utah, sitting as a Committing Magistrate , been duly bound over to answer this charge, is accused by J. Vernon Erickson, District Attorney for the Sixth Judicial District of the State of Utah, of the crime of assault with intent to commit rape and said District Attorney charges that on the 1st day of August 1951 at Sigurd, County of Sevier, State of Utah, the said Delbert Waters, did wilfully, unlawfully, feloniously violently and forcibly make an assault upon one Carol Lipsey,a female not then and there the wife of said Delbert Waters and with intent then and there feloniously and by force and violence, to carnally know and ravish the said Carol Lipsey and accomplish with her an act of sexual intercourse, against her will and without her consent, contrary to the form of the statute in such case made and provided,and against the peace and dignity of the State of Utah "

On the 11th day of September, 1951, defendant was arraigned before Honorable John L Sevy, Jr. Judge of the District Court of Sevier County, State of Utah.

The defendant entered a plea of not guilty to the charge. The case came on for hearing before the Honorable John L. Sevy, Jr. on the 18th day of September, 1951, who heard the case without a jury, a jury being expressly waived by the defendant. The opening statement by the State was waived by District Attorney J. Vernon Erickson.

The State presented its evidence and rested, the defendant at this time moved to have the case dismissed on the ground that the State had failed to sustain its burden and had not produce d sufficient evidence to support the issues raised by the information. The motion was denied. The defendant then rested and submitted the case upon the evidence adduced by the State, no further evidence being put into the record and the State waiving its right to make

a closing statement.

On the 19th day of September, 1951, the Honorable John L. Sevy, Jr. announced the verdict of the court was the defendant was guilty as charged. Thereafter on the 24th day of September and before the judgment and sentence of the court had been pronounced, the defendant filed a motion for arrest of judgment against him on the ground that the information filed by the State and the conduct of the State during the course of the trial did not apprise the defendant of the particular crime w4th which he was charged. That during the process of the trial two separate offenses of the same nature were attempted to be shown. The State did not elect to prosecute one offense or the other. Each offense was argued before the Court and the defendant was found guilty of the charge made

in the information. No finding was made as to the separate offenses. The defendant was thereby tried without having been given proper notice and was prejudiced in that he was unable to make a proper defense. Defendant is further prejudiced because he is unable to determine from the record which alleged offense he was found guilty of committing. The motion was also based on the ground that the facts proved did not constitute the public offense of which he was found guilty. The motion was denied and the defendant was sentenced to be imprisoned in the Utah State Prison for an indeterminate term of not less than one or more than ten years The defendant after judgment and sentence had been pronounced, filed a motion for a new trial on the groun d that the decision was contrary to the evidence adduced during the course of

the trial and that the evidence was totally insufficient to justify the verdict and decision of the court. The motion was denied. Thereafter, the defendant appealed to the Supreme Court of the State of Utah.

STATEMENT OF FACTS

There is very little dispute as to the facts in this case. The defendant did not take the witness stand to controvert any of the facts elicited from the State's witnesses and no witnesses were called in the defendant's behalf.

The defendant, Delbert Waters, met his friend Garry Dickinson, who was then 16 years of age at about 8:30 p.m. on the evening of July 31, 1951, at Garry Dickinson's home in Richfield. Delbert Waters was driving a car he had borrowed from his brother. The boys decided to go in the car and get drunk. (Tr. 22)

Delbert Waters had been drinking before he met Garry. Garry Dickinson testified that he thought Delbert had had quite a bit to drink by that time. While together, the boys drank beer which had been purchased by Delbert Waters at Jorgenson s Cafe in Salina Utah. (Tr. 23) Garry Dickinson estimated that they drank about 3 cans of beer each before they decided to go the home of Carol Lipsey, the complaining witness, which was in Sigurd, Utah (Tr. 23).

The testimony of Carol Lipsey was that af the time of the alleged offense she was 15 years of age (Tr. 3) and she was spending the night of July 31st and August 1, 1951, at home alone. Her parents were in Yellowstone National Park (Tr. 5) and her sister was spending the night with her Aunt and Uncle. (Tr. 6) She said that she had gone to bed and

had been in bed for a short time when Garry Dickinson opened the door to her room and came in. He turned on the light and asked if Eleith was there. Carol Lipsey answered "No" and asked what made him think she would be there. He said "I thought she was going to stay here." (Tr. 6) Carol said she then checked the time and it was 12:20 a.m. (Tr. 6). She said it was "kinda late to go and see Eleith, wasn't it?" Garry said "O.K." and went out turning off the lights and closing the door. (Tr. 6).

A short time later Garry Dickinson returned with the defendant, Delbert W ters. They went into the bedroom and turned on the light. Carol Lipsey was clothed in only her brassiere and pants and said that she could not get out of bed because she had so little on. (Tr. 7) The defendant and Garry said they had

decided to come in and talk to her. The boys talked to her for some time continuing to drink beer in her presence, (Tr. 9) Garry Dickinson went to use the telephone and left Delbert Waters and Carol Lipsey alone in the bedroom together. Delbert went over to the bed and started patting C-rol on the head and he called her "blondie." She testified that she then shoved him away from her . (Tr. 7) Delbert requested C-rol Lipsey to call a girl for him, so she put on a housecoat and went to the telephone. (Tr 7-8) The girl Miss Lipsey called was in bed and did not come to the telephone. (Tr. 8) Delbert Waters again started patting Miss Lipsey on the head and called her "blondie." She ran into the bedroom and he followed her. He put his arms around her and pushed her onto the bed. Carol Lipsey called to Garry

Dickinson and he came into the bedroom and "took hold" of Delbert and said "come on, let's go." (Tr. 27) Delbert got up and went into the other room and sat down on the couch. He then said "Let s not go now." (Tr. 27) A short time later Delbert Waters did leave the house with Garry Dickinson. (Tr. 28) The record shows that at the time he pushed Miss Lipsey down on the bed he was fully clothed and at no time did he attempt to undress or expose himself in any manner. (Tr. 27).

Garry Dickinson testified that he and Delbert Waters drove to S-lina Utah and that they continued to drink beer. He estimated that Delbert drank approximately 8 cans of beer while the two boys were together. (Tr. 32) When the boys left Salina and started back for Sigurd, Delbert Waters was driving the car. The

effects of his drinking showed in his driving and Garry Dickinson offered to drive the car. (Tr. 32) Garry Dickinson said that Delbert Waters stopped in front of the Carol Lipsey home and got out of the car. When he got out of the car he staggered and Garry thought he was "quite drunk" at that time. (Tr.33)

Carol Lipsey testified that after the boys left her place she went back to bed and went to sleep. Some time later she was awakened and Delbert Waters was in bed with her. (Tr. 10) He had both arms around her. (Tr. 10) She had her back to him. (Tr. 16) Delbert Waters was attempting to feel her person; he attempted to feel her chest and she testified that she grabbed his hands, moved them and held them for some time. He later moved his hands down and attempted to remove her pants. He pulled on them

but at no time offered to tear them from her person. (Tr. 17) She testified that he had his "thing" out and tried to put it between her legs (Tr. 11) but she took hold of his hands and held them. He then held her around the waist and went to sleep. (Tr. 11) The record shows that Delbert Waters was a man of considerable strength and had been making his livelihood by cutting and hauling cedar posts and pine poles from the hills which is hard physical labor. He could carry posts and poles of considerable weight and load them on the truck. It was estimated that some of the posts he carried were up to 120 pounds in weight. Garry Dickinson testified that he himself could not carry and load posts of such size. (Tr. 30-31) Miss Lipsey on cross examination admitted that she did not have the strength to

overpower him. (Tr. 17)

After Delbert Waters went to sleep, Carol Lipsey slipped out of bed and went into the bathroom. She then left the house and ran to the home of her Aunt and Uncle. (Tr. 11) The Aunt and Uncle came back to Carol Lipsey's home and upon finding Delbert Waters still asleep Carol Lipsey's Uncle, Willis D. Allred, called Charles Carter the Sigurd Town Marshall, who came to the Lipsey house. Mr. Carter went into the bedroom where Delbert Waters was sleeping and upon discovering that he was still asleep, he left him there and went to the telephone and called the Sevier County Sheriff Clarence Smith. Sheriff Smith came to the house shortly thereafter and talked to Delbert Waters and pulled him off the bed thereby awakening him. (Tr. 34-36) The Sheriff then took Delbert Waters to

the Sevier County Jail at Richfield and incarcerated him.

ARGUMENT
Point 1

THE FINDING OF THE COURT WAS CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE AND WAS UNSUPPORTED BY THE EVIDENCE.

Rape as defined by our statute 103-51 15 Utah Code Annotated, 1943, is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under any of the following circumstances:

1. When the female is under the age of thirteen years.

2. When she is incapable through lunacy or any other unsoundness of mind whether temporary or permanent of giving legal consent.

3. Where she resists, but her resistance is overcome by force or violence.

4. Where she is prevented from resisting by threats of immediate and great bodily harm accompanied by apparent power of execution, or by any intoxicating, narcotic or anaes-

thetic substance administered by or with the privity of the accused.

5. When she is at the time unconscious of the nature of the act and this is known to the accused.

6. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused with intent to induce such belief.

The facts of this case restrict us to a consideration of whether the defendant assaulted Carol Lipsey with intent to commit rape by force and violence and by overcoming her resistance. "In order to warrant a conviction of the crime of assault with intent to commit rape, the State must prove beyond a reasonable doubt every essential element of rape except the final consummation of the act. It must be shown beyond a reasonable doubt that the defendant made an assault upon the female, with intent to use such force as was necessary in order to have

sexual intercourse with her against her will and without her consent." State v. Anderson (Utah) 257 P. 370. The intent to rape is the very gist of the offense, it cannot be assumed. It is the position of the appellant that the State has failed to show evidence from which an intent to commit rape can reasonably be found. An examination of the facts in this case tends to negative such intent rather than to sustain it.

The record shows that the first time Delbert was at the home of Carol Lipsey on the morning of August 1, 1951, he was at no time in the house with her alone. He came to the house with Garry Dickinson a friend of Carol Lipsey, and Garry Dickinson was present in the house though not always in the same room. The boys had gone into the bedroom where Carol Lipsey was sleeping and had talked

to her for some time. While Garry Dick inson was in another room using the telephone, it is shown that the defendant went over to Miss Lipsey, who was still in bed. and patted her on the head and called her "blondie." Carol Lipsey shoved him away. He then asked Carol Lipsey to call Ann Gurr, a young girl living in Sigurd, Utah, for him. She agreed to do this and put on a housecoat and went to the telephone. After the call was made and it was learned that Ann Gurr was in bed, Delbert Waters again patted Carol Lipsey on the head and called her "blondie." She then ran into the bedroom. Delbert Waters followed and caught her and put his arms around her and pushed her onto the bed. He was at this time fully clothed and at no time did he expose his body or private parts. He did nothing to disrobe Miss

Lipsey. He at no time threatened her, struck her or attempted to remove or tear her clothing from her person. The evidence taken in the worst light against the defendant may support the idea that he did desire to have intercourse with Miss Lipsey if he could have gained her consent but this evidence is so equivocal that this may not be a fair inference to draw from it. After Delbert Waters had pushed Carol Lipsey onto the bed she called Garry Dickinson. He came into the bedroom and took hold of Delbert Waters and said "Come on, let's go." (Tr. 27) Delbert got up, went into another room and sat down on the couch. He then left the house with Garry Dickinson shortly thereafter. Miss Carol Lipsey then remained in the house alone and went back to bed and to sleep, which tends to show that she did not take a

too serious view of the events that had taken place.

Delbert Waters and Garry Dickinson left Carol Lipsey in Sigurd and drove to Salina, Utah. Delbert Waters had been doing a great deal of drinking and he, along with Garry Dickinson continued to drink. Garry Dickinson one of the State's witnesses, said that Delbert Waters had had "quite a bit to drink" when he came to Garry's home early in the evening and that he estimated that while he and the defendant were together, Delbert Waters drank about eight cans of beer. When they returned from Salina to Sigurd the defendant was driving the car and the effects of his drinking showed in his driving to such an extent that Garry Dickinson offered to drive. When Delbert Waters stopped the car in front of Carol Lipsey's home, he staggered as

he walked toward the house.

Delbert Waters walked into the house and into Carol Lipsey s bedroom. Taking Miss Lipsey's testimony at full value, he got into bed with her and put his arms around her. She was in bed with her back to the defendant. He at first started to feel her person. He moved his hands to her chest. She grabbed his hands and was able to move them down to her waist and then was able to hold them for some time. He freed his hands and moved them down to the lower regions of her body. He started to remove her pants and when she resisted this action he placed his hands under them. C rol Lipsey testified that she could also feel his "thing" and that he had tried to put it between her legs. She said that she then "took hold of his hands and held them just as tight as I

could." (Tr. 11) Delbert Waters then held her around her waist for a short time and went to sleep. Carol Lipsey got out of bed, leaving the defendant asleep upon the bed.

Delbert Waters had a considerable amount to drink during the evening of July 31, 1951 and the morning of August 1, 1951 and the testimony shows that he was feeling the effects of the alcohol he had consumed. The fact that he was under the influence of alcohol tends to explain some of the strange circumstance in this case and it also tends to negative the necessary criminal intent required for a conviction in this case.

Carol Lipsey was home alone on the morning of August 1, 1951. No other person besides the defendant was in the house. Her parents were in Yellowstone National Park and her sister was staying

with her Aunt and Uncle for the night. This being the case there was nothing to stop the defendant from raping Carol Lipsey on the morning of August 1, 1951, had that been his intention when he returned from Salina and went into her bedroom. The State's evidence shows that Miss Carol Lipsey a 15 year old girl, was able to control the defendant's hands when he attempted to feel her person. When Delbert Waters started to feel her lower person and to remove her pants she offered resistance by "taking hold of his hands and holding them tigh." He then held her around the waist and went to sleep. Delbert Waters could not have intended to rape Carol Lipsey or he would have done so. The record shows that Carol Lipsey was able to control the defendant in spite of the great difference in the physical strength of the

two parties. Carol Lipsey was a young 15 year old girl who admits that she would not have the strength to overpower the defendant. (Tr. 17) Delbert Waters is shown to be a young man of considerable strength. He had been making his living for a period of months before the time of this alleged offence by cutting and hauling cedar posts and pine poles from the mountains. It is shown that he could carry posts of considerable weight, some of the posts were estimated to have a weight of 120 pounds, to a truck and load them on it. (Tr. 31) Garry Dickinson had been working with the defendant for a period of over a month prior to the date of this alleged offense and he testified that Delbert W ters could carry and load posts he was unable to handle. (Tr. 31)

It should be noted that the defen-

dant did no overt acts which would point unequivocally to an "intent to rape." He at no time said he was going to have intercourse or even suggested that he desired to intercourse with Carol Lipsey. He made no concerted effort to overpower her resistance, in fact, when his advances were resisted he stopped his activity and went to sleep. It should again be noted that at the time Delbert Waters got into bed with Carol Lipsey, she was the only person in the house and there was no one to interfere or prevent the raping of Carol Lipsey had that been the defendant's intention. Only one conclusion can be reached under the circumstances and that is that Delbert Waters did not intend to rape Carol Lipsey. This conclusion is strengthened and supported by a brief review of the authorities on the crime of assault with

intent to rape.

In the leading Utah case of State v. Whittinghill, 163 P. 2d 342 the appellant had been convicted in the court below of the crime of assault with intent to rape. In reversing the decision of the trial court this Court said:

> "The facts in this case restrict us to the consideration of whether the defendant assaulted the prosecutrix with intent to commit rape by force and violence and by overcoming her resistance. An assault with intent to commit rape includes every ele - ment of the crime of rape except that the act of intercourse is not committed. The felonious intent is the essence of the offence. It is elementary, when a specific intent is required to make an act an of- fense, that the doing of the act does not raise a presumption that it was done with the specifie in- tent." Cap v. State, 61 Okl. Cr. 173, 66 P.2d 959, at page 963; Hall v. State 67 Okl. Cr. 330, 93 P.2d 1107; Kitchen v. State, 66 Okl. Cr. 423, 92 P.2d 860.
>
> "We think the fact, viewed most favorable for the prosecution, are not sufficient to constitute the crime of an assault with intent to commit rape. This court in State

:v. McCune, 16 Utah 170, 51 P. 818 held as stated in the syllabi: 'In cases of assault with intent to commit rape, the intent with which the assault is made is of the essence of the offense; and, in order to convict, the jury must be satisfied, beyond a reasonable doubt, not only that the defendant had the abi ity and intended to gratify his passions on the person of the woman assaulted, but that he intended to do so at all events, and notwithstanding any resistance on her part.'

"When the intent is the gist of the offense that intent should be shown by such evidence as, uncontradicted, will fairly authorize it to be presumed beyond a reasonable doubt.

"In Hall v. State, supra, the court recited the evidence of the case in detail. The facts supporting in - tent are, we think, stronger than in the case at bar. The Oklahoma Court held the evidence was insuf - ficient and reversed the judgment with directions to dismiss. In Kitchen v. State supra, the court says: 'The intent is the gist of the offense and every laying of hands on the female under the age of consent, even though improper does not necessarily imply an intent to have sexual intercourse. Indecent liberties may be taken with a child without any such intent. The statute recognizes this

on providing a penalty for taking indecent liberties with a female child without intent to commit the crime of rape.'

"See State v. Mortensen, 95 Utah 541, 83 P. 2d 261. And likewise in the case now before us the fact that the accused in court admitted that it was his intention to have sexual intercourse with the prosecutrix and that he put his hands on her is not evidence that will, of itself support the criminal intent required for conviction of assault with intent to rape, for such evidence will support a contention that the accused did the acts for the purpose of arousing the passions of the prosecutrix expecting her to submit to intercourse, just as well as a criminal intent to commit rape.

"Specific intent may be inferred from acts. It may be shown like other facts from surrounding circumstances. The circumstances when taken together must admit of no other reasonable hypothesis than that of guilt to warrant conviction. Kitchen v. State, supra.

"The case of State v. Hennessy 73 Mont. 20, 234 P. 1094, 1096, when considered with the case at bar is both interesting and enlightening. The facts of the case are much stronger in support of criminal intent to commit rape than those now before us. The Montana Court held:

'We credit every physical act of the defendant as detailed by the prosecutrix with the full force of every reasonable deduction or inference, or deduction which in our judgment will sustain the contention of the State that the defendant at any time entertained the intention to overcome the physical resistance of the prosecutrix and have sexual intercourse with her without her consent. Accepting her story as true, she was, of course, offended assaulted, and aggravatingly insulted. From her testimony, if true, we must conclude that the defendant desired to have sexual intercourse with her, and as said in Commonwealth v. Merril, supra (14 Gray, Mass., 415, 77 Am. Dec. 336). 'There is ample proof of gross indecency and lewdness and simple assault. However, such facts alone do not constitute an attempt to commit the crime of rape. They will support a charge of assault of an aggravated character and, as to this the State was not without an ample remedy, and available and adequate statutory provision for punishment in the event of a conviction. The defendant's conduct, as detailed by the prosecutrix, was reprehensible the more so because of his station in life, and may not be justified or approved in morals or law.'

"There is no evidence that the defendant said he was going to rape

the prosecutrix or have intercourse with her against her will. The accused never threatened the lady, never struck her, nor tore her clothing from her person. What he did supports the contention that he was attempting to gain her consent and not to overcome any mental or physical resistance by force. The acts of the prosecutrix as they left the scene of the assault do not support any claim of such criminal intent. We think the record fails to establish the criminal intent required for a conviction. The accused was guilty of attempted immorality and by prejudice was con - victed of a heinous offense which the record does not warrant.

"If the accused at the time he first unlawfully placed his hands upon the prosecutrix had the intention of raping her why did he fail to do more than he did? The lust which impresses the mind with intent to rape and causes one to commit a criminal assault is not mild, neither easily diverted nor dissi - pated except by unforeseen forces or unexpected interference. Sexual passion so violent as to create the criminal intent to rape is not destroyed or diverted by mild resistance, uncleanliness or ordinary evidence of the menstrual period."

"The strongest case that can be made against the accused is that he assaulted the prosecutrix with in-

tent to have sexual intercourse, but this intent was vacated when she resisted and he discovered she was unwell. We believe evidence of criminal intent to warrant submission of the facts to a jury on a charge of assault with intent to commit rape must be much stronger and far more fixed and convincing than established by the most favorable evidence presented in this case."

Clearly the facts of the present case will not substantiate conviction of the defendant under the law as it exists in the State of Utah. The Defendant used no form of force or coercion upon Miss Carol Lipsey to force her to submit to sexual intercourse with him against her will. In fact the defendant stopped feeling Carol Lipsey's person when she did offer some serious resistance to him He then relaxed and went to sleep. There was at that time nothing to prevent the crime of rape upon the person of Carol Lipsey had the defendant intended to do so. But instead of committing the crime

of rape he went to sleep and continued to sleep in her bed under these strange conditions while she left the house and got her Uncle and Aunt. He continued to sleep while the Sheriff was called and he was still asleep when the Sheriff came and took him into custody.

The actions of the defendant cannot be explained by saying that he intende d to rape Carol Lipsey. Such an explanation is beyond common reason and its falacy is shown by these simple questions: Why under the circumstances, did not Delbert Waters rape C rol Lipsey? Why would he go to sleep and allow her to leave the house and go for help while he remained in her bed under such precarious circumstances?

The California case of People v. Mullen, 114 P. 2d 11, follows the Utah holdings and also adds support to the

contention of the appellant that the evidence was insufficient to justify a conviction. The Court uses the following language:

> "A man is guilty of rape by force and violence when he has carnal knowledge of a woman forcibly and against her will. When the man employs force with intent to effect an act of copulation against her will notwithstanding her resistance he thereby commits an assault with intent to rape provided that his intent is coupled with the present means of accomplishing his purpose. 52 C.J. 1026. If penetration be accomplished, it is rape; if not, is the crime of assault with intent to rape by force. Whatever the extent and however rough the fondling of the woman, if her pursuer without fear of interruption voluntarily abandons his endeavor to ravish her sexual organs, then the force he employed was not an assault with intent to commit rape. The mere fact that he is garbed in the vestments of the male and displays the gestures of such is not sufficient to establish an intent upon his part to effectuate his sexual desire against any opposition of the woman. The persuasions, caresses and embraces of the seducer are not evidences of a felonious intent. The man may generously employ all these arts with force, hoping to

persuade, and yet finally abandon his prey. In such an event he were guilty of nothing more than simple battery.

"The finding of intent to commit rape is the sine qua non of a judgment of guilty of assault with in - tent to commit rape, i.e., to befoul the body of a woman against any physical opposition she might offer. Unless the defendant indicated a resolution to use all his force to commit rape, then there is no satisfactory proof of such intent. Nothing points to such fixed purpose. She was small and illy equipped to cope with so formidable an adversary. He was large and possessed sufficient physical power to have accomplished his purpose.

"But aside from all other considerations the prosecutrix testified that, after her feeble resistance, unhindered and alone, she walked forth from the dance room without molestation she spoke the words that cleared defendant of a felony."

The evidence adduced by the State in the present case, taken in its most damaging sense against the defendant might justify a finding that the defendant desired to have sexual intercourse if he could have gained Carol Lipsey's

consent but this is entirely foreign to any intent on his part to commit the crime of rape.

Point 2

THE DISTRICT COURT BELOW ERRORED IN REFUSING TO ARREST JUDGMENT ON THE GROUND THAT THE INFORMATION FILED BY THE STATE AND THE CONDUCT OF THE STATE DURING THE COURSE OF THE TRIAL DID NOT APPRISE THE DEFENDANT OF THE PARTICULAR CRIME WITH WHICH HE WAS CHARGED AND THE RECORD GIVES NO INDICATION OF THE PARTICULAR CRIME OF WHICH HE WAS CONVICTED.

After the trial of Delbert Waters had closed and the Court had found him guilty of the crime of assault with intent to rape as charged but before judgment had been pronounced and the defendant was sentenced, the defendant moved to arrest judgment on the ground that the information filed by the State and the conduct of the State during the course of the trial did not apprise the defendant of the particular crime with which he was charged. During the process

of the trial two separate offenses of the same nature were attempted to be shown. The State did not elect to prosecute one offense or the other. Each alleged offense was argued before the Court and the defendant was found guilty of the charge made in the information. No finding was made as to the separate offenses. The defendant was thereby tried without having been given proper notice and was prejudiced in that he was unable to make a proper defense. Defendant is further prejudiced because he is unable to determine from the record which alleged offense he was found guilty of committing.

The information charged Delbert Waters with committing the crime of assaulting Miss Carol Lipsey, with the intent to commit rape on the 1st day of

August, 1951. Counsel for the State at the opening of the trial against the defendant waived its opening statement and proceeded to call the State's first witness. The prosecution then went on to show two separate incidents on the morning of the 1st of August, 1951, and it relied upon both for conviction. The prosecution first put on evidence concerning the first time Delbert Waters and Garry Dickinson were at the home of Carol Lipsey. (Tr. 8; Tr. 26-27) at which time defendant made advances toward Miss Lipsey. He patted her on the head, called her "blondie" and later followed her into the bedroom, put his arms around her and then pushed her down on the bed. Garry Dickinson then came into the room and took hold of defendant and said, "Come on let's go." Defendant then went into the other room and sat

down.

The prosecution later put on evidence in regard to the second time the defendant was in Miss Lipsey's home on the morning of August 1, 1951. (Tr. 9-15) The testimony was that he came into the house while Miss Lipsey was asleep and got in bed with her. He put his arms around her and started to feel her per - son, Miss Lipsey finally took hold of his hands and caused him to stop. He then went to sleep and continued to sleep until the Sheriff came to the house and took him into custody.

The State at no time elected to rely upon one or the other of these acts for a conviction. The prosecution waived its opening statement of the case and in addition it also waived its right to make a closing statement.

When the prosecution argued the de-

fendant's motion for a directed verdict at the close of the State's case, counsel argued that either or both incidents were sufficient to sustain a convi tion. The Court made the general finding that Delbert Waters was guilty of the crime as charged. It is, therefore, impossible to determine from the record which incident was the basis for the crime for which Delbert Waters was convicted.

This Court in the early leading case of State v. Hilberg 61 P. 215, considered facts where the defendant had been charged with having had unlawful sexual intercourse with a female over the age of 13 and under the age of 18 years. The prosecution put into evidence several acts of intercourse during a 14 months period. In reversing the case the following language was used:

Pg 216. "The trial court permitted

the prosecution to introduce six distinct acts or crimes to be shown in evidence before the jury as having occurred in 1897 and 1898, during a period of 14 months, without requiring any election to be made and allowed the case to go to the jury upon all the several acts of sexual intercourse shown, when only one act was or could be charged against the defendant. Such a course was calculated to confound, distract, and confuse the defendant in his defense. He was expected to meet one charge at a specified time but was required to defend against and meet six different acts occurring during a period of 14 months, upon one of which the jury were asked to convict. Whether the jury united in a verdict upon each act, or some on one and others on another of the acts proved is problematical. The course pursued subjected the defendant to the risk of conviction upon six charges occurring at different times and places, against which he could not be expected to be prepared to defend, and yet a conviction or acquittal upon one would be no bar to a future prosecution of any except th e first act shown. No jury should be set to fishing or hunting for a charge which they are called upon to try. Such a course deprived the defendant of a fair trial, and compelled him, without warning, to defend against acts of which he had no notice. Manifestly he could not be prepared to meet such confu-

sing charges not contained in the information.

In the same opinion the Court later said:

> "No election having been made by the prosecution, the law made the election. What before this had been uncertain and contingent was now fixed and definite. This election having been thus made by proving the first act of intercourse as having taken place in April, 1897, no subsequent election could be made, nor could the prosecution prove any other act of the kind as a substantial offense upon which a conviction could be had; but it could prove the intimacy and improper relations of the parties prior to the acts shown in the month of April, 1897, but not afterwards. Where the information contains several counts charging distinct offenses, then it is competent and the duty of the prosecution, to make its election at or before the close of its case."

In the California case of People v. Martinez, 208 P. 170 which considered the problem under discussion it was said:

> "The district attorney did not make the election which the law requires of him. Neither did the court, when the case went to the jury, di-

> rect the jurors' minds to any par - ticular act of intercourse with an instruction that it was incumbent upon the prosecution to establish that act by evidence beyond a reas- onable doubt before a verdict of guilty could be returned against the defendant. The court's failure so to instruct the jury was error, notwithstanding defendant's neglect to demand that the district attor- ney make an election."

The California court then declared the error non-prejudicial, but it failed to consider the question of how the de - fense of res judacata could be settled if the prosecution should elect to again try the defendant on a selected offense which had already been put into evidence at the trial below. We quote the lang- uage of the court because it follows the general and established rule that some election must be made in such cases by the prosecuting attorney or there must be an election by law.

Laycock v. People, 182 P. 880, a Colorado case discusses the problem as

follows:

> "That the selection should be made before defendant is compelled to proceed with his defense all authorities agree; but whether it should be made before the people introduce any evidence or at the close of the people's case, or during the progress of the trial, if other transactions are developed, the authorities do not seem to be in harmony. The matter rests largely in the discretion of the trial court, and in most cases it would be better for the court to permit the evidence to proceed far enough to identify the transaction upon which the people rely for a conviction before compelling a selection."

The authorities appear to be united on the holding that at some time during the course of the trial an election must be made by the prosecution where there is proof of more than one offense brought into the evidence under a criminal charge. If no election is made at any time by the prosecution, the Utah case, State v. Hilberg, supra, appears to hold that an election must be made as a mat-

ter of law by the court. The first incident or offense which is put into evidence by the prosecution becomes the sole offense upon which it can rely for conviction. Here the defendant, Delbert Waters, was prejudiced by the uncertainty of the basis of his conviction and the considerations leading to it. He was not fairly and justly tried as he could not properly prepare a defense to a charge that was never brought into the trial openly and allowed to be refuted by the defendant. In the State's case against the defendant, the State's attorneys were allowed to argue two sepa - rate offenses as being the basis for a single conviction. The court found the defendant guilty as charged but there was no finding as to which incident the court had based its decision upon. The judgment of the court does not show what

offense the defendant was convicted of committing and could not be used alone to support the defense of res judicata if the State should elect to try the defendant again on either of the two incidents or offenses.

If the court did consider the first incident put into evidence a the basis for the conviction, it should be noted that the evidence regarding it does not tend to show the necessary criminal intent which must be shown by the State. The evidence regarding the first incident was so equivocal that it cannot sustain the conviction.

CONCLUSION

The finding of the lower court that the defendant was guilty of the crime of assault with intent to rape is contrary to the evidence adduced during the course of the trial.

In addition, the defendant was denied a fair trial in that the prosecution was allowed to put on evidence of two separate offenses and at no time was required to elect and rely upon one of - fense or the other for a conviction. The defendant was thereby prejudiced in that he could not make a proper defense to the action against him and is now further prejudiced in that he cannot show the specific offense for which he was tried and convicted as a bar to any future prosecutions for the same offense.

In view of the lack of evidence to sustain the conviction, and the error committed in the trial court which deprived the defendant of a fair trial, the defendant respectfully urges thi s court to reverse the judgment of conviction, or in the alternative to grant him a new trial.

Respectfully submitted,

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